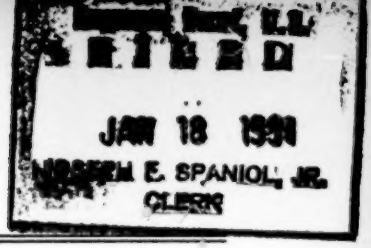
(3)

No. 90-704



In The

Supreme Court of the United States

October Term, 1990

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,

Petitioner,

vs.

STEVEN W. HAMM, CONSUMER ADVOCATE FOR THE STATE OF SOUTH CAROLINA,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of South Carolina

PETITIONER'S REPLY BRIEF

J. ROBERT FITZGERALD, Esquire
FRED A. WALTERS, Esquire
SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY
1600 Hampton Street
Columbia, South Carolina 29201
(803) 748-8700

LEWIS, BABCOCK, PLEICONES & HAWKINS
A. CAMDEN LEWIS, Esquire
Counsel of Record
PETE KULMALA, Esquire
1513 Hampton Street
Post Office Box 11208
Columbia, South Carolina 29211
(803) 771-8000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

STATEMENT

Respondent's brief fails to address the question concerning expert testimony presented by petitioner for review by the Court. Instead, respondent has focused on an entirely different question, relating to the "substantial evidence" rule, which is not implicated in the Petition for Certiorari. The Brief in Opposition has, accordingly, not diminished the basis for granting Certiorari presented in the Petition.

ARGUMENT

Respondent has totally and completely missed the point of the Petition for Certiorari. It is Petitioner's contention that its right to procedural due process under the Fourteenth Amendment was abridged by the South Carolina Supreme Court's heretofore non-existent requirement that the outside materials or studies relied upon by an expert in the course of his testimony be introduced into evidence. Inexplicably, Respondent elected to argue in support of the state supreme court's decision on an evidentiary point not even raised by the petition. Although the entire thrust of Petitioner's Brief was directed toward the evidentiary rule relating to testimony by expert witnesses, Respondent has not addressed this issue at all, but instead argued that the State Supreme Court had correctly applied the substantial evidence rule, which is not the question presented. In the first sentence of its statement of the case, Respondent's assertion that the State Supreme Court "simply applied to the facts an

evidentiary requirement already existing under the South Carolina law", simply begs the question at hand.

While the substantial evidence rule may be implicated in appellate review of state agency decisions, it is not at all relevant to the procedural due process question presented by Petitioner herein. As set forth in the Petition for Certiorari, the issue requiring the Court's attention is the due process denial wrought upon Petitioner by the South Carolina Supreme Court's departure from the evidentiary rule relative to expert opinion, and the creation of a wholly new rule which it applied against Petitioner, without any notice or possibility of compliance. This in itself is a denial of Petitioner's right to due process, since litigants are entitled to have decisions, even in state court cases, rendered by processes that are fair. The manner in which the rules of evidence were changed in this case can hardly be considered the product of a fair process. Consequently, Petitioner was denied its right to procedural due process.

CONCLUSION

This case simply does not implicate the "substantial evidence" rule, which involves the degree of proof required to sustain a factual finding by a state administrative agency. Rather, here we are challenging the rule which serves as the foundation of the requirement for the admissibility of expert testimony with probative value. In effect, Respondent has presented no opposition to the Petition for Certiorari, and has, indeed, not stated any cogent, reasonable basis to deny the Petition.

Respectfully submitted,

FRED A. WALTERS, Esquire
SOUTHERN BELL TELEPHONE &
TELEGRAPH COMPANY
1600 Hampton Street
Columbia, South Carolina 29201

AND

LEWIS, BABCOCK, PLEICONES
& HAWKINS
A. CAMDEN LEWIS
PETE KULMALA
1513 Hampton Street
Post Office Box 11208
Columbia, South Carolina 29211
(803) 771-8000

Attorneys for Petitioner
Southern Bell Telephone and
Telegraph Company

Columbia, South Carolina

January 17, 1991